

No. 15411.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOHN J. MOYLAN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

On Appeal From the United States District Court for the
Southern District of California, Central Division.

Hon. Harry C. Westover, Judge.

BRIEF FOR APPELLEE.

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BRIEF FOR APPELLEE.

Jurisdictional Statement.

The trial court had jurisdiction of this action by virtue of Section 1346(a)(2) of Title 28, United States Code, and this court has jurisdiction of this action under Section 1291 of Title 28, United States Code.

Statement of the Case.

Appellant was and is a duly licensed freight forwarder, and engaged in such business in the City of Los Angeles, State of California. The Pacific Westbound Conference was and is an association of ocean carriers operating from West Coasts Ports. Prior to June, 1951, member carriers of the said Conference did not pay a brokerage fee to

freight forwarders. The General Services Administration, which is a part of the executive branch of the United States, did pay a brokerage fee to freight forwarders prior to that time.

In June, 1950, appellant submitted a bid of $6\frac{1}{2}$ cents per ton, or a minimum charge of \$7.50 per shipment, and was awarded a contract with General Services Administration. [Ex. 1.] At the trial appellant stated that the reason he submitted a bid of $6\frac{1}{2}$ cents a ton was to get on the list of government approved forwarders of shipments. [Tr. p. 23.] This contract expired by its own terms on June 30, 1951.

In June, 1951, this Conference Rule was changed and commencing July 1, 1951, freight forwarders were paid a brokerage fee of $1\frac{1}{4}\%$ of the ocean freight charge on all shipments transported by member carriers. On July 3, 1951, appellant wrote to General Services Administration (hereinafter termed GSA) and offered to renew the previous contract, and offered his services free, in view of the payment of brokerage by the member carriers. [Ex. 2.] Appellant stated in part:

“We would like at this time to have this Contract extended for any period you see fit.”

“In view of the payment of Freight Brokerage by the steamship companies we will offer our services at no charge to you.”

Mr. Salisbury of GSA replied, declining to renew the contract, but stating that the future brokerage business of GSA would be rotated among the registered Freight

Forwarders. The said letter of July 9, 1951 [Ex. 3] stated in part:

“Inasmuch as the conference carriers now pay brokerage to Freight Forwarders as designated by the shippers, there would be no purpose in effecting a further contract for the forwarding services.”

Commencing on or about July 15, 1951, on various occasions GSA requested appellant to act as its agent in performing forwarding services on appellee's shipments, and used appellant's services as a forwarding agent until August, 1953. On a number of occasions appellant demanded that GSA file with the said Conference a designation of appellant as agent of the appellee. [Exs. 4, 5, 9, 10.] GSA refused to designate appellant as agent of GSA, mainly for the reason that the conference rule required that appellant be designated as an agent who actually booked the cargo, and under the then GSA regulations, GSA booked its own shipments. [Exs. 11, 13.] Therefore GSA refused to allow appellant to book the cargo or to credit appellant with the booking.

Because of this refusal of GSA to file the designation of agency with the Conference, appellant was unable to receive brokerage fees from the carriers. If appellant would have been able to receive brokerage fees from the carriers, appellant would have received \$8,543.72 from such carriers.

Appellant submitted a claim to GSA in the sum of \$238.48 for postage expenses incurred in performing the services for GSA on the latter's shipments. This claim

was approved by GSA and appellant was reimbursed in full for said expenses. Appellant also submitted a claim for compensation in the sum of \$8,305.24 for alleged brokerage fees. (\$8,543.72 less the postage of \$238.48.) [Tr. pp. 30-33.] The United States rejected this claim, but conceded that appellant had performed valuable services for the United States and offered *quantum meruit* compensation, submitting \$1,881.10 in full settlement of the claim. Appellant refused the offer, claiming compensation in the amount of 1¼% of the ocean freight charge. Appellant received a check of the United States in the sum of \$1,881.10, forwarded to him in payment of the claim. Although appellant refused and continued to refuse to acknowledge such check as payment of his alleged claim, he held and continues to hold said check. [Tr. pp. 30-33.]

Appellant instituted this action to recover compensation lost by him during the period of June, 1951, to August, 1953.

Summary of Argument.

I.

On the contract counts, appellee's argument is as follows:

A. Assuming for the sake of argument only that appellant and GSA entered into an agreement, whether bilateral or unilateral, that would have been binding upon GSA if executed by one who had power to bind GSA for such contracts, the dealings between appellant and GSA complained of in this action, including the letters which allegedly formed such agreement [Exs. 2, 3], were with an officer of GSA, namely, Joseph E. Salisbury who had no authority to bind GSA to any contract.

B. Whether or not Salisbury had any authority to bind GSA to a contract with appellant, there was as a matter of fact and law, no bilateral or unilateral contract between appellant and GSA.

C. Since there was no binding contract between appellant and GSA, the latter agency could not have breached any contract.

D. Since there was no contract between the appellant and GSA, the question of measure of damages for breach of contract has no significance.

II.

On the *quantum meruit* count, appellee's argument is as follows:

A. Appellee concedes that appellant is entitled to *quantum meruit* compensation, and in this respect appellant has already received *quantum meruit* compensation from appellee in the reasonable amount of his services.

B. Reasonable value of the services was in this case found by the trial court to be in a sum equivalent to that which appellant would have received from appellee, had the same contract for services been in effect, which had expired just before the beginning of the services for which this suit is brought. Such sum constitutes the best evidence of what are the reasonable value of the services.

C. The finding of the trial court as to what constitutes the reasonable value of the services should not be disturbed by appellate court upon review.

ARGUMENT.

I-A.

Salisbury Had No Authority to Contract for GSA.

If there were any contract between appellant and GSA, such contract must be found in the terms of the exchange of letters between appellant and Joseph E. Salisbury, of GSA. [Exs. 2, 3.] There is no evidence in the record that Mr. Salisbury had any authority to bind GSA to any contract, bilateral or unilateral. In fact there is uncontroverted evidence in the record that Mr. Salisbury had no such authority. [See Ex. A, received into evidence upon stipulation of the parties, Tr. p. 19.] It will be noted that the original contract between the parties, dated June 7, 1950 [Ex. 1], was not executed by Mr. Salisbury, but by another official of GSA, in the Purchase and Stores Division who had authority to enter into such binding contracts on the part of GSA. It is a well known fact of which the court may take judicial recognition that only certain officials of the United States have power to enter into contracts. A person dealing with the United States must take notice of cognizance of the extent of the authority conferred by law upon a person acting in an official capacity. (*Whiteside v. United States*, 93 U. S. 247, 23 L. Ed. 882 (1876); *United States v. Stewart*, 311 U. S. 60, 70, 61 S. Ct. 102, 85 L. Ed. 40 (1940).)

Anyone entering into an agreement with the United States must ascertain that those who purport to act for the Government stay within the bounds of their authority, even though the agents themselves may be unaware of the limitations upon their authority. (*Federal Crop Ins. Corp. v. Merrill*, 332 U. S. 380, 384, 92 L. Ed. 10, 68 S. Ct. 1 (1947); *Reconstruction Finance Corp. v. Martin Dennis Co.*, 195 F. 2d 698, 701-702 (C. A. 3, 1952); *Wildermuth v. United States*, 195 F. 2d 18, 24 (C. A. 7, 1952).)

The United States is not bound by acts of its officers in excess of their authority, even though it be claimed that such acts constitute estoppel. (*United States v. California*, 332 U. S. 19, 91 L. Ed. 1889, 67 S. Ct. 1658 (1947); *United States v. San Francisco*, 310 U. S. 16, 84 L. Ed. 1050, 60 S. Ct. 749 (1940); *State of Utah v. United States*, 284 U. S. 534, 76 L. Ed. 469, 52 S. Ct. 232 (1932); *Utah Power & Light v. United States*, 243 U. S. 389, 61 L. Ed. 791, 37 S. Ct. 387 (1917); *Montana Power Co. v. Federal Power Commission* (C. A. D. C., 1950), 186 F. 2d 491, cert. den. 340 U. S. 947, 95 L. Ed. 683, 71 S. Ct. 532.)

Any assurances, assuming that such were made, that appellant would be entitled to his full brokerage charges on the same basis as if he were compensated by the carriers would be outside the authority of Mr. Salisbury, and hence could not create a lawful obligation binding upon the United States.

Appellant in his opening brief at page 8 correctly states the rule that the United States is only liable upon those contracts entered into by its duly authorized officers or agents, where such officers or agents are acting within the scope of their authority on behalf of the Government. Here there is no showing that the officers or agents who allegedly made the contract were acting within the scope of their authority, in fact there is evidence that they had no such authority. [Ex. A.]

Appellant cites the case of *Smale and Robinson, Inc. v. United States* (S. D. Cal., 1954), 123 F. Supp. 457, as authority for the proposition that acts or omissions of agents lawfully authorized to bind the United States, or direct its course of conduct during a particular transaction will work estoppel against the government if agents acted within the scope of their authority. It is important to note that Judge Mathes in such case delimited such case of

estoppel to a situation in which the Government agent acted within the scope of his authority. In the case at bar, Mr. Salisbury would not have acted within the scope of his authority in creating any such contract by estoppel. Moreover, there were no facts shown as to constitute estoppel, and the trial court made no such finding as to any facts that might work estoppel against the United States, even assuming that the doctrine of estoppel were applicable against the United States.

I-B.

There Was No Unilateral or Bilateral Contract Entered Into Between Appellant and GSA.

GSA did have authority to contract with appellant. This is evidenced by the fact that appellant did enter into a valid contract with GSA on June 28, 1950, for services rendered [Ex. 1], prior to the period of time for which appellant seeks to recover in the present action. With reference to the controversy at bar, appellant and GSA did not enter into any contract.

In the letter of July 3, 1951 [Ex. 2] appellant offered to renew the contract, and further offered his services at no charge to GSA, in view of the payment of freight brokerage by the steamship carriers. Mr. Salisbury of GSA replied [Ex. 3], and refused to enter into any new contract. The latter stated that it would be the future practice of GSA to rotate future tonnage as it became available between the registered Freight Forwarders listed with the Federal Maritime Board.

Thus, although there is an offer of a sort, there is no acceptance on the part of GSA, even assuming only for the sake of argument that Mr. Salisbury had power to bind GSA to such a contract. There was no counter-offer by GSA, since Mr. Salisbury stated what was the then

intention of GSA as to the future placing of business. There was no consideration for any contract since there was no accepted promise inuring to GSA, and no promise of any sort by GSA to appellant. Hence no bilateral contract arose.

At a later time, appellant performed certain services which were to the benefit of GSA. Admittedly those services were not purely voluntary on the part of appellant but were performed by appellant at the request of GSA. Appellant had previously informed GSA that any such services would be performed at no charge to GSA, since appellant would look to the carriers for compensation. No unilateral contract was formed, since GSA did not promise to do anything for the acts done by appellant. There was no promise by GSA in return for an act of appellant. Therefore, appellant can have no recovery on the basis of a contract with GSA.

I-C.

There Was No Breach of Contract on the Part of GSA.

Since there was no bilateral or unilateral contract between appellant and GSA, there could be no breach of contract of any sort by GSA. The latter agency had not promised to do anything, therefore appellant could not demand any affirmative action on the part of GSA. GSA had reserved at all times the power to book its own shipments. Therefore, appellant could not lawfully demand that GSA surrender such right.

I-D.

There Are No Damages Arising Out of Breach of Contract.

Since there was no contract, and no breach of contract, there are no damages payable by appellee for any alleged breach of contract.

II-A.

Appellant Has Already Received Quantum Meruit Compensation From Appellee in the Reasonable Amount of Appellant's Services.

Since appellant did perform services, which services were at the request of GSA, appellant was entitled to receive compensation from appellee on the basis of *quantum meruit*, for the reasonable value of his services. The General Accounting Office determined that appellant was entitled to *quantum meruit* recovery; that \$1,881.10 was the amount that appellant would have received from GSA under the old expired contract [Ex. 1]; and that said sum of \$1,881.10 was the reasonable value of appellant's services. [Exs. 15-18.] General Accounting Office sent to appellant its check for \$1,881.10 which appellant retained at the time of trial. [Tr. p. 28.] Therefore appellant has already received *quantum meruit* compensation from the appellee for the reasonable value of his services.

II-B.

Reasonable Value of Services Is an Amount Equal to What Appellant Would Have Received if the Old Contract Had Remained in Effect.

Since the trial court held that the reasonable value of appellant's services was in an amount equivalent to that determined by the General Accounting Office, namely, the sum of \$1,881.10, the amount that appellant would have been entitled to had he been compensated under the terms of the original expired contract, there is no need to discuss the point as to whether the United States has consented to be sued for such *quantum meruit* recovery.

Suffice it to say that the trial court determined that the reasonable value of appellant's services on a *quantum meruit* basis was equivalent to what appellant would have

earned under the old expired contract. This was the most fair basis that could be devised for determining what was the reasonable value of appellant's services. The original contract was freely negotiated by appellant and GSA under no coercion or threat of governmental action such as exercise of the war power or right of eminent domain. It is submitted that there is no fairer basis of determining what is the reasonable value than the same basis as was used by the identical parties to the transaction, for the identical services, at a time relatively close and prior to the time in question.

It is submitted that bona fide transactions made within a reasonable time before the date of valuation of the services involved in the action are the highest and best evidence of the fair and reasonable value of the services in question.

See: *United States v. New River Collieries*, 262 U. S. 341, 344, 43 S. Ct. 565, 67 L. Ed. 1014 (1923); *Olson v. United States*, 292 U. S. 246, 255, 54 S. Ct. 704, 78 L. Ed. 1236 (1934); *United States v. Toronto Nav. Co.*, 338 U. S. 396, 344, 70 S. Ct. 217, 94 L. Ed. 195 (1949); *United States v. Meyer*, 113 F. 2d 387 (C. A. 7, 1940), cert. den. 311 U. S. 7; *Washington Home for Incurables v. Hazen*, 70 F. 2d 847 (App. D. C., 1934); *Baetjer v. United States*, 143 F. 2d 391, 397 (C. A. 1, 1944); *Welch v. TVA*, 108 F. 2d 95, 101 (C. A. 6, 1939); *United States v. Ham*, 187 F. 2d 265, 270 (C. A. 8, 1951).

This is especially true when the previous transaction was one between the very parties to the present transaction, and involves virtually the identical subject matter.

Over the objection of the appellee, the court admitted into evidence a statement by the appellant that the reason he entered into the original contract at the lower rate was

to get on the list of government approved forwarders. [Tr. pp. 22-23.] The court did not have to accept such a self-serving statement on the part of appellant, and even if the court did accept the statement of appellant as to his subjective reason, this would play no part in the objective fact that the original contract [Ex. 1] was negotiated by the parties thereto at a given figure of compensation, with no indication that the subjective reason of appellant was communicated to or acted upon by GSA at the time of negotiating the original contract.

Aside from a possible rise in the cost of living from 1950 to 1951, there would seem to be no additional factor which should rightfully increase the fair rate of compensation for services under this claim, from 1950 to 1951-1953.

The rate paid by the carriers to brokers in the same position as appellant is not a fair comparison. The carriers stand in a different economic relationship than does the shipper in such an instance. The carrier is willing and able to pay a higher commission to the broker than does the United States as a shipper, as evidenced by the fact that appellant was willing to accept by contract a much lower rate of contractual compensation from the United States as a shipper, than he was willing to accept from the carrier.

It would not be fair to the United States as a shipper to charge it the same amount as the carriers were willing to pay out of their profits for the goods being booked with specific carriers. Let us take a familiar example to prove this economic fact. Let us suppose that we go to a travel agency as a matter of convenience and obtain steamship tickets to Europe. The travel agency charges us the same amount for the tickets as would the steamship com-

pany had we gone to the latter directly. We could have gone directly to the steamship company and paid the same price for the tickets but we prefer to deal with the travel agency because of the little additional services the latter provides to us. The travel agency receives nothing from us, but obtains its profits from the discount or commission it receives from the steamship company, let us assume 10% of the ticket price. Let us further assume that the travel agency changes its policy and now seeks to charge us 10% of the ticket price for the various services it performs for us. We would refuse to use the services of the travel agency, as it would be far more economical for us to buy our tickets directly from the steamship company. In such an example, the steamship company is willing and able to pay to the travel agency 10%, but the traveler is neither willing nor able to pay the 10% for such services. Here is an instance where the reasonable value of the services differs depending upon the economic relationship which the parties bear to each other.

Appellant did not perform all of the services for GSA as he would have performed for a private shipper, in that the GSA reserved the right and did select the carrier. [Tr. p. 32.]

II-C.

The Finding of the Trial Court as to the Reasonable Value of Appellant's Services Should Not Be Disturbed on Appeal.

The trial court had before it two opposing contentions as to reasonable value of services. The first was that of plaintiff, namely, the sum of \$8,543.72, which appellant testified he would have received had he been paid the 1¼% figure by the carriers. The second contention was that of appellee that the sum of \$1,881.10 is the fair and

reasonable value of services, since that is the amount that appellant would have received from GSA if the old contract had been in force. There was no other evidence of any sort as to what might constitute the reasonable value of appellant's services. It is submitted that the trial court rightfully selected that evidence contended for by appellee. Since the trial court made a finding to that effect based upon controverted evidence, it is respectfully submitted that such a factual determination by the trial court should not be disturbed upon appeal.

Conclusion.

The judgment below should be affirmed.

Respectfully submitted,

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